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JAMES H. McKENNEY,
Clerk.

No. 369, 132

APPEAL PRINTING CO., 14-16 Vesey Street, N. Y.

Br. of Porter for D. C. (on mo.)

Filed Oct. 14, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

COMMERCIAL PUBLISHING COMPANY,
Plaintiff in Error,

against

SAMUEL C. BECKWITH,
Defendant in Error.

No. 369.

To

Messrs. OTIS & PRESSINGER,
Counsel for Plaintiff in Error,
111 Broadway, New York.

Please take notice that on the third Monday in October, 1901, at the opening of this Court on that day, or as soon thereafter as counsel can be heard, the motions of which the annexed are copies will be submitted to the Supreme Court of the United States for the decision of that Court thereon.

Annexed hereto is a printed copy of the brief of argument to be submitted to the Court with said motions in support thereof.

Dated N. Y., Sept. 25, 1901.

ANTHONY B. PORTER,
Counsel for Defendant in Error
for purposes of the motion,
Tribune Building,
New York.

THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

COMMERCIAL PUBLISHING COMPANY, Plaintiff in Error, against SAMUEL C. BECKWITH, Defendant in Error.	*No. 369.*

And now comes the defendant in error and moves this Court to dismiss the writ of error therein for want of jurisdiction, because it does not appear from the record in this cause that there is any federal question involved in the controversy between the parties herein,

And the said defendant in error also moves this Court to affirm the judgment from which said writ of error was taken, because, although the record in this cause may show this Court has jurisdiction in the premises, yet it is manifest that the grounds assigned for said writ are frivolous, and that such writ was taken for delay.

Dated N. Y., Sept. 25, 1901.

ANTHONY B. PORTER,
Counsel for Defendant in Error,
for purposes of these motions,
Tribune Building,
New York.

IN THE SUPREME COURT OF THE UNITED STATES.

COMMERCIAL PUBLISHING COMPANY, Plaintiff in Error, against SAMUEL C. BECKWITH, Defendant in Error.	No. 369. Oct. Term, 1901.

BRIEF OF ARGUMENT.

MOTIONS TO DISMISS AND AFFIRM.

History of Cause.

This action was commenced in the Supreme Court of the State of New York, the complaint therein alleging *the collection and appropriation by defendant of a sum of money belonging to plaintiff and asking judgment therefor.*

Record, p. 2, etc.

Defendant for an answer to the complaint, *justified his collecting and appropriating such money under the provisions of an agreement in writing, which gave him authority therefor, and a lien upon such collections, for the purpose of applying the same in liquidation of a loan, and denying plaintiff's right to such monies.*

Record, p. 6 etc.

In January, 1891, the defendant in error, being a resident of New York, loaned to the Memphis Appeal Company, a printing and publishing stock corporation under the laws of Tennessee, at Memphis, in that State, the sum of $30,000, in consid-

eration of which, and as a part of the transaction that company constituted and appointed the defendant its Eastern agent with offices at New York and Chicago, and at the same time and for the purpose of securing to defendant, the payment of the said loan, with interest, and as evidence of said loan and appointment, the parties entered into an agreement in writing which will hereafter be referred to as the loan agreement.

Record, pp. 11 & 12, fols. 20–21.

Up to about September 30th, 1893, only the sum of about $10,000 had been received by defendant on account of said loan, there being an unpaid balance thereof due to him on that day of at least $20,000, *no part of which has ever been received by defendant, except as above stated.*

Record, p. 13, fol. 22

On or about this date the company, without the consent, knowledge or approval of the defendant, and undoubtedly for the purpose of defrauding the defendant, and preventing him from collecting the said unpaid balance of said loan, made and delivered a so-called trust deed of conveyance of the newspaper plant to Gwynne & Morgan, two of its creditors, for the purpose of securing them and other preferred creditors under said deed for the satisfaction of their several claims against the company, and said trustees thereupon took possession of said plant accordingly.

The trustees within a short time instituted a suit in the Chancery Court of Tennesee for the purpose of enforcing said deed and therein petitioned for the appointment of a Receiver, and said Court, thereupon appointed Wm. G. Chase of

Memphis, a Receiver, *pendente lite*, accordingly who immediately took possession of said trust property and undertook to carry on the publication of the newspaper, the Memphis Appeal-Avalanche, then being published by said company.

Record, p. 13, fols. 5–6 and p. 16, etc.

Soon after the appointment of the receiver, various actions in the nature of creditors' suits, three in number, were brought by creditors in the said Court.

Record, p. 14, fols. 24, Sec. 11.

The defendant was not named in said trust deed as a party in interest nor was his unpaid balance of said loan, or any part thereof secured or provided for thereby.

Record, p. 16, etc.

The defendant was not named in any of the said creditors' suits as a party thereto, nor was brought into the same by any process, nor did he ever appear as a party or otherwise in either thereof.

Thereafter the said trust deed suit and the said three creditors' suits were consolidated by a proceeding in said Court, but defendant was never made a party to said proceeding or appeared therein.

Record, p. 14, Sec. 11.

Thereafter the said trust deed was declared and adjudged by the United States Court of Tennessee as invalid and void, and as a consequence the said suit to enforce the same abated and ceased to exist, *and had so abated at the time of the making of the decrees hereinafter mentioned.*

Record, p. 37, Sec. 3.

The Receiver having failed to carry on the pub-

lication of said newspaper, the Chancery Court appointed by its decrees commissioners for the sale of the company's property, as an insolvent corporation, and under said decrees said commissioners sold said property, *and also all the right, title and interest of the Receiver of, in and to the accounts, the subject matter of this action*, to one West J. Crawford for the gross sum of $65,200, who in turn assigned his purchase to the plaintiff in this suit.

Record, pp. 14, 15, Secs. 12, 13.

In the meantime, and before the said consolidation, the said defendant had been made a party to said trust deed suit, *but for what purpose or upon what ground does not appear*, and he thereupon caused the same so far as he was concerned to be removed to the United States Circuit Court in Tennessee *on the ground of his non-residence in that State*, and he thereby *ceased to be within the Jurisdiction of the Chancery Court in and about that suit or any proceedings connected therewith.*

Record, p. 14, Sec. 10.

It appears incidentally and from matters extraneous to the agreed statement of facts on which this suit was tried that defendant had at some time obtained a judgment against the company, and that a suit was pending in favor of Foley-Williams Co., against the Memphis Appeal Co., and that there was a fund of some kind in the hands of some Court, and that the defendant had moved to have a levy of an execution on his judgment made a lien on said fund and that the Court had denied the motion, *but what that judgment was for—What said Foley-Williams Co. suit was for, or, what said fund in Court was, it nowhere appears* on the record and *as it must be manifest that neither of these con-*

ditions were connected with the said trust deed suit or the creditor's suit, it may be regarded as immaterial to further consider the same, and particularly so as the said Foley-Williams suit was not one of the three creditors suits included in the consolidation proceedings, *and that the money collected by defendant for which this suit was brought, was never in the hands of the Court, nor in the State of Tennessee, but was always in the hands of defendant and appropriated to liquidate the loan account and that he never had any occasion to obtain a judgment therefor.*

Record, p. 35, fol. 61, etc.

At the time of the making of the trust deed, the company had in its possession certain advertising-matter *furnished it by the defendant under said loan agreement,* and which had not as yet been published, in the newspaper printed and circulated by the company, and immediately upon the receiver taking possession of the trust property under the deed, a controversy arose between him and defendant concerning same, *in which the receiver took the ground that he had the right to publish same in the company newspaper to be continued by him and collect the charges therefor, and the defendant contending that if the receiver published the same, he, defendant was entitled under the terms of the loan agreement to collect the charges therefor and apply same to extent of $1000 monthly upon the account of said loan, but no controversy regarding such matter was ever brought into Court nor was such dispute ever the subject of judicial consideration in any of the various suits in the state or United States Courts in the State of Tennessee.*

Record, p. 13, secs. 4, 23.

While the receiver was conducting the publication of said newspaper under the trust deed—he published the said advertising matter in the newspaper as continued by him, and endeavored to collect the charges therefor, but was unsuccessful in the attempt, the defendant having collected and applied the same to the liquidation of the loan account *under his authority and privilege contained in said loan agreement.*

Record, p. 13, secs. 8, 24.

The sales commissioners sold the newspaper property generally under the sales decree of the Chancery Court, *and it appears from the record that only the right, title and interest of the receiver therein in the disputed accounts in this suit was sold by said commissioners.*

Record, p. 15, sec. 13.

Prior to the commencement of this action the plaintiff demanded of the defendant the various amounts collected by him under the loan agreement for charges of the publication of said advertising matter by the receiver, and on defendants refusal, instituted this suit to recover the same, which was then estimated to be about $4,000.

Record, p. 14, sec. 9.

The case came on for trial upon an agreed statement of facts in writing before his Hon. Mr. Justice Beach, at New York (Record, p. 11, etc.), resulting in a denial of plaintiff's motion for judgment and an order that the exceptions be heard in the first instance at Appellate Division, which duly coming on to be heard, resulted in sustaining said exceptions and ordering a new trial.

The new trial resulted, as a matter of course, in a judgment for plaintiff—as also did defend-

ant's appeal therefrom to the Appellate Division, and an appeal was thereupon taken by defendant to the Court of Appeals, where said judgment was reversed, from which action of that Court the writ of error herein was taken by the plaintiff.

Record, p. 45, fol. 80, etc.

The defendant maintains that *neither the pleadings in the suit as instituted in the N. Y. Supreme Court, or the facts as agreed to in writing by the parties thereto for the trial of the cause, set up or presented any federal question for the consideration of the Court thereon*—nor is there any evidence by the record that any such question was an issue on said trial, *the only question to be determined thereon under the pleadings being the construction and scope of the written agreement between the defendant and the company under which said loan and appointment was made, and if or not defendant was justified thereunder in his said collections by virtue thereof.*

POINT I.

If there be any federal question shown by the record it must arise within Sec. 709, U. S. R. S., and appear on the face thereof so clearly and plainly that no argument is necessary to discover the same.

The contention of the plaintiff in error is based upon an alleged disregard by the Court of Appeals of the State of New York, of alleged prior adjudications by the Courts in Tennessee upon the questions involved in this suit, by its direction to the Supreme Court of New York to enter a judg-

ment adverse to the plaintiff, as a result of its reversal of the decisions of the Courts from which an appeal was taken to it by the defendant.

To sustain this contention the plaintiff makes certain assignments of alleged error to this Court, to the effect that the decision of such appeal to the New York Court of Appeals violated the provisions of the Constitution of the United States, but fails to indicate what portion thereof was so violated.

Record, p. 51, fol. 91, etc.

To successfully maintain the plaintiff's said theory upon which the writ of error herein was taken it must appear by the record that the federal question involved therein must have been set up in the pleadings upon which the trial was had in the lower Court, and such question must plainly appear upon the face of such record as having been so set up in such pleadings, *and so plainly and clearly set up as to require no argument on plaintiff's part to demonstrate its presence to this Court.*

Does this condition of the case present itself on the record before this Court?

The answer to this proposition should be a negative one, as will appear, not only from a reading of the record, but from the labored statement and assignments of error by the plaintiff on his application for this writ, which is supplemented by an exhaustive brief of an argument on his part in its support, for the purposes of resisting these motions.

Spies v. Illinois, 123 U. S., 131.

POINT II.

It does not appear by the record that a sufficient federal question was set up by the pleadings, or was necessarily involved in the complained of action by the N. Y. Court of Appeals, and for this reason the writ of error should be dismissed for want of jurisdiction in this Court, and the judgment of the lower Court affirmed for the frivolousness of the grounds upon which the writ was taken.

To sustain a writ of error, *it must appear by the record*, that some, or all of the conditions contained in Sec. 709, U. S. R. S., are present and that the Court complained of in and by the assignments of alleged error has violated or disregarded the same, or some thereof, and that such action was inconsistent with the law and practice in such cases.

To give the Supreme Court jurisdiction on a writ of error from a State Court *the record must show* that a certain provision of the Constitution, an act of Congress, or a treaty between this and another country was relied upon by the party thus bringing the writ, and that the right thus claimed was denied, *not merely that the question might have arisen or would have been applicable, but that it actually arose and was necessarily involved in the decision complained of.*

The record must show on its face,

1st. That a federal question was set up by the pleadings.

2d. That the decision of the lower Court was adverse.

3d. That the decision was by the highest Court in the State.

4th. That such decision necessarily *involved a disregard of such federal question.*

These requirements are not satisfied by the record in this case.

There are three claimed errors assigned by the plaintiff as the grounds for the taking of the writ, two of which rest upon an alleged disregard by the New York Court of Appeals of certain decrees of the Court of Chancery of the State of Tennessee.

Record, p. 51, etc., fol. 91, etc.

To sustain these three assignments of error, or any one of them, it must appear on the record that the Courts in Tennessee had judicially considered and adjudicated the matters in dispute between the Receiver and the defendant concerning the publication of the advertising matter in question and the rights of parties to collect the charges for the same, and to have fixed and determined the right, title and interest of each party to the controversy therein to such collections, but it does not so appear, and the fact that such Courts may have assumed to direct the disposition of the accounts does not constitute such an adjudication.

Two of the decrees of the dates mentioned in the said assignments of error appear on the record, each being of the Chancery Court of Tennessee, *but the decree mentioned in the first assignment of error as having been made by the U. S. Circuit Court in Tennessee does not appear on the record.*

The reasons and ground for the action of the New York Court of Appeals assigned as the said three grounds of error does not appear in the record in this Court aside from the *remittitur* upon which the complained of action of the N. Y.

Supreme Court was founded, *but such reasons and grounds appear in the opinion of the Court on the decision of said appeal from the judgment of the Appellate Division*, and officially published pursuant to the laws of that State, the opinion therein being supported by the full bench, is for the convenience and information of this Court for the purpose of these motions, set out as follows:

COMMERCIAL PUB. CO.,
Respondent,

against

SAMUEL C. BECKWITH,
Appellant.

N. Y. Rep., 167, page 329, etc.

HAIGHT, J.—The plaintiff as the assignee of the purchaser at a judicial sale, brings this action to recover moneys claimed to have been due and owing the receiver by the defendant.

The facts were agreed upon and so far as they are material are as follows: On the 3d day of January, 1891, the defendant entered into a contract with the Memphis Appeal Company, a corporation engaged in publishing a newspaper at Memphis, in the State of Tennessee, of the name of *The Memphis Appeal Avalanche*. The contract consists of two letters written by the parties, bearing the same date which are as follows:

"MEMPHIS, Tenn., January 3, 1891.

"*S. C. Beckwith,*
48 Tribune Building,
New York City.

"DEAR SIR: In consideration of special efforts

which you pledge yourself to make in our behalf to the best of your efforts and ability, and furthermore, in consideration of allowing you nothing in the shape of salary, office rents or traveling expenses, we hereby authorize and appoint you our sole and exclusive agent for a term of five years from September 1, 1891, and sooner if possible, on a plain commission basis of 25 per cent. on all business for all that portion of the United States north of a line running east and west with the southerly boundary of Ohio, Missouri, embracing Cincinnati and St. Louis, including these two points.

"All applications for rates, space, &c., from aforesaid territory to be referred to you, and in case we should make a deal direct with any parties, agent or advertisers from your territory (which, however, is not contemplated), we will allow you the commission named upon same and refer it to you for collection.

"You are to collect all bills and render monthly statements, and to be held responsible for all accounts, except where a concern should fail through no fault of yours, and in event of that you are simply to lose your commission, but not to be liable beyond that.

"You are not to represent any other morning paper in the State of Tennessee or Arkansas without our consent in writing, but to do all you can in every way, and at all times, within the above territory, to advance the interests of the *Appeal Avalanche*.

"MEMPHIS APPEAL AVALANCHE COMPANY,
" T. B. HATCHETT,
"Bus. Manager.

"Accepted—S. C. BECKWITH."

"MEMPHIS, Tenn., January 3, 1891.

"*The Memphis Appeal Company, Memphis, Tenn.:*

"GENTLEMEN—In consideration of a contract this day entered into by and between us, I hereby agree to advance to you $30,000 as follows:

"5,000 in cash on or before January 7, $5,000 on or before the 12th of January, 1891, then $5,000 on the 26th of January, 1891, to take up your note

now in the Nassau Bank of N. Y. for that amount. And $15,000 from time to time as you may advise me and so desire.

"The amount named of $30,000 to be loaned you on the Appeal Company's notes, indorsed by W. A. Collier, and I am to be further secured by a deposit as collateral of an equal amount of the capital stock of your company, and which stock shall not be increased without my consent during the term of this loan; neither shall any incumbrance be placed upon the same.

"Said loan and interest at 6 per cent. to be paid me in monthly installments by moneys coming into my hands from the advertising in your paper, in amounts, say $1,000 per month, until paid.

S. C. BECKWITH.

"O. K. MEMPHIS APPEAL COMPANY, T. B. HATCHETT (Business Mang'r).

(Indorsed:) "As the debt is reduced I will surrender stock collateral *pro rata*.

"S. C. BECKWITH."

The contract, so far as appears, was performed to the mutual satisfaction of the parties until the 30th day of September, 1893, when the Memphis Appeal Company became insolvent and transferred by a deed of trust all its interest in the newspaper referred to, including the plant, good will subscription list, advertising patronage, &c., to Robert J. Morgan and Andrew D. Gwynne, as trustees for the benefit of creditors. On the same day the trustees brought an action against the Appeal Company, the defendant in this action, and others, to procure a judgment directing them to carry into effect the transfer to them as provided in the deed, and in that action one William J. Chase was appointed the receiver of all of the property transferred to the trustees, who was, by the order appointing him, authorized to continue the publication of the newspaper. The receiver so appointed entered upon the discharge of his duties as such and continued the publication of the paper until the 16th day of June, 1894, when the property of the company, which had been transferred by the trust deed to the trustees, was, under an

order of the court, sold to one Crawford for the sum of $65,200, and was by him transferred to the plaintiff in this action. It further appears that, at the time, the receiver was appointed, the defendant had procured orders for advertisements from a large number of individuals, which had not at that time been published in the paper. He thereupon after advising the receiver as to the provisions of the contract existing between him and the company, gave him notice in writing that the contract was in full force and that he should insist upon its full performance. The receiver replied, in writing, saying he should not recognize the contract; that while he considered it his duty to carry out the advertising contracts which were in the course of completion in the current publication of the paper, he should not recognize the defendant thereafter, and that on all business thereafter handled collections would be made by the receiver direct, instead of by the defendant. The defendant then replied refusing to admit the claims of the receiver. Thereafter, the receiver continued the publication of the newspaper and published therein the advertisements obtained by the defendant and delivered to the paper prior to the appointment of the receiver. The value of these advertisements amounted in the aggregate to $3,902.74, which sum the defendant collected from the persons from whom he had procured the advertisements and now refuses to pay the same over to the receiver or to the plaintiff in this action, claiming the right to hold and apply the money in satisfaction of his commissions and the loan made by him to the company under his contract of January 3, 1891, the amount of which, at that time remaining unpaid, exceeded the sum of $20,000.

After the facts had been submitted to the court the defendant moved for a dismissal of the complaint. This was refused, and he then moved for a direction of the verdict in his favor. This was also refused, and then, upon motion of the plaintiff, a verdict was directed in its favor for the full amount of his claim. Exceptions were taken by

the defendant to each of these rulings of the Court.

In determining these questions it becomes important to first ascertain the meaning and the effect of the contract entered into between the defendant and the Memphis Appeal Company. As we have seen, the two letters constituting the agreement bear the same date and were evidently intended to be read and considered together. So reading them they constitute one contract and not two independent agreements. In the first place, the defendant Beckwith appears to have loaned the Memphis Appeal Company the sum of $30,000, with interest at 6 per cent., to be paid in monthly installments out of moneys coming into his hands from advertisements published in the Memphis Appeal Company's paper in amounts of $1,000 per month until the loan was paid in full, and in consideration for this loan the Memphis Appeal Company agreed to appoint the defendant their agent for the period of five years to procure advertisements for their paper in a territory specifically designated. He to fix the rates, collect the bills, render monthly statements, and have for his compensation 25 per cent. commission. The clause of the agreement giving to the defendant the right to collect all of the bills was evidently intended to give him the control of the proceeds resulting from the advertisements, so that he could apply the same upon his loan to the amount of $1,000 per month; and this provision of the contract, we think, was in the nature of an equitable pledge of the receipts for that purpose. When the receiver of the corporation was appointed he took possession of the assets and business subject to the liens and obligations of the corporation. As receiver he could refuse to carry out or execute the contract of the defendant, and by so doing, leave him with his claim for damages for a breach of the contract; or, if he saw fit, he could carry out and perform the contract of the corporation and thus prevent any claim for damages. He could not, however, perform the contract and receive the benefits without satisfying the obligations of the company thereunder. When, there-

fore the receiver accepted and published the advertisements procured by the defendant, he must be deemed to have done so under the contract which the defendant had with the corporation, and under that contract the defendant had the right to collect the moneys accruing for such advertisements and to retain out of such collections a sum not to exceed $1,000 per month, to be applied upon the loan. All collections exceeding that amount belonged to the receiver. But inasmuch as the collections did not exceed that sum per month, there was nothing going to the receiver which was recoverable in this action.

It is said that the receiver, having published the advertisements and incurred the expenses incident thereto, had earned the amount which the advertiser agreed to pay, and that he therefore was entitled to all of the proceeds therefrom. The Appellate Division appears to have entertained this view, but this leaves out of consideration all of the rights which the defendant had acquired under his contract, and all the time and money expended by him in procuring the contracts for advertisements from all sections of the country covered by his agency. That Court was also of the opinion that Express Co. v. Railroad Co. (99 U. S., 191) was an authority in support of its position, but to our minds it has no application. In that case the express company had loaned the railroad company the sum of $20,000, and the railroad company had agreed to carry freight for the express company, applying the sums due for transportation upon the loan monthly. The railroad company passed into the hands of a receiver and the express company sought to compel a specific performance of the contract by the receiver. The bill was dismissed and we think properly. As we have already seen the receiver had a right to refuse to carry out or execute the contract of the corporation whose assets had come into his hands. But, as we have already shown, he cannot adopt and perform the contract and receive the benefits without also incurring the obligations. If the receiver of the railroad company had concluded that it was for the best interests of the estate to carry out the

contract with the express company, a very different question would have been presented. To the same effect is Central Trust Co. v. Marietta & N. G. R. R. (51 Fed. Rep., 15), also relied upon by the Appellate Division."

But one other question requires consideration here, and that is as to whether the rights of the defendant have been settled by previous litigation in this case.

As we have already shown, an action was brought by the trustees under the deed in trust to procure a judgment directing them to carry into effect the transfer to them, in which action a receiver was appointed. The defendant Beckwith was made a party to this action and he subsequently procured a removal of the action, so far as he was concerned, into the Circuit Court of the United States. Thereafter several general creditors brought actions against the Memphis Appeal Company for the purpose of winding it up as an insolvent corporation. Subsequently all of these actions were consolidated and proceeded to trial in the Chancery Court of Shelby County, Tennessee, which resulted in a decree, which was also entered as a decree in the Circuit Court of the United States. Under this decree it was adjudged that the levy of the execution in the case of Foley-Williams Manufacturing Company *et al.* created no lien upon the assets of the company, and the court, therefore, dismissed the cross bill of Samuel C. Beckwith. It further appeared in the decree that the prayer of Samuel C. Beckwith for leave to appeal from so much of the decree as adjudged that he had no lien upon the fund in court for the payment of his judgment against the Memphis Appeal Company was granted upon his executing a bond for costs in the sum of $1,000. The decree contained numerous adjudications as to the rights of other parties, but nothing further affecting the rights of the defendant. A review was had in the Supreme Court of Tennessee, in which the decree was in part reversed and modified, and, in other respects, affirmed. There was nothing, however, in the reversal or modification that appears to affect the defendant, Beckwith. None of the pleadings are

set forth in the record, so that we are left without information as to the precise issues raised and tried. We are not advised as to the interest Beckwith had in the execution levied by the Foley-Williams Manufacturing Company. It is quite apparent, however, that it had no connection with the matter involved in this litigation. We are not advised as to the character or the amount of the judgment which he sought to have established as a lien upon the fund in court. Possibly he had obtained a judgment against the Memphis Appeal Company for the amount of his loan and that he sought to have this paid out of the fund in the hands of the receiver, but this is merely a suggestion based upon the allowance of his appeal, and does not appear as a fact in anything that we have been able to discover in the record. We think, therefore, that the judgment of the Court of Chancery of the State of Tennessee does not affect the rights of the defendant in this action. It did not adjudicate nor attempt to determine his right to the moneys received by him for advertisements inserted in the paper by the receiver after his appointment. Under the judgment the purchaser became entitled to all the moneys due and owing to the receiver by reason of the publication of the paper, but moneys that did not belong to the receiver, or to which he was not entitled, did not pass to the purchaser, and we find nothing in the prior decree that is an adjudication upon this question.

We think the judgment should be reversed, and, inasmuch as the facts are established by the written stipulations of the parties, final judgment should be ordered in favor of the defendant, dismissing the complaint, with costs in all Courts.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ., concur.

Judgment reversed, &c.

From the reading of this opinion it is clear that *the Court of Appeals did not consider that there was any Federal question appearing on the record before it, which record is now before this Court*

for its action on these motions, and that its decision was upon a view of the case not inconsistent with such record and within the scope of the pleadings therein.

If the Federal question said by plaintiff in error to have been duly set up in this cause be present it should appear by the record.

1st. The bill of complaint in this action upon which this suit was instituted should contain a plain and clear statement of such question, and so pleaded that there could be no doubt that it was the intention of the pleader to set up and raise such Federal question as a bar to defendant's right to defend therein as against an adjudication thereof by the Courts of another State.

Record, p. 2, etc.

The mere recitation in such a pleading that certain legal proceedings occurred in another State is not sufficient, for if there existed a Federal question at the time of the institution of this suit in New York by way of a former adjudication in another Court upon establishing the cause of action upon which this suit was founded and which was claimed to be binding on defendant, *it should have been so pleaded and the recovery therein sought on such grounds and not left open to a conflict upon generic grounds.*

It will be here observed that the complaint in this action—although reciting matter clearly, extraneous and immaterial to the cause of action therein set up—is for the recovery of money *claimed by the plaintiff to belong to him, as an original proposition, and is not sought to be recovered for on the ground that the ownership and title thereto was in*

the plaintiff by reason of an adjudication in litigation theretofore existing in another Court in which such title and ownership had been the subject of consideration and decision by such tribunal, and that thereby the plaintiff was entitled to recover in this suit.

It needs but a reading of the complaint in this action to see at once that no such federal question was set up therein or relied upon as the ground of the asked for recovery, but that such recovery was demanded for the reason that plaintiff was entitled to the same upon generic grounds *and not by right of a former adjudication in another Court establishing a right to recover: and a reading of the answer to the complaint makes it clear that the issue formed by the pleadings, was whether or not defendant had a lien and the right to the money under and for the purpose of the loan agreement.*

Record, p. 6, etc., 2d.

The agreed statement of facts upon which this suit was tried, should have so clearly and plainly set forth such federal question as to leave no doubt as to its meaning and purposes, that there had been a *former adjudication* of the questions at issue in this suit, *and that the rights of the Receiver, the defendant and others claimed under the trust deed the loan agreement, or otherwise had been thereby settled and adjudicated, but there is no such fact in such statement, and it is not to be presumed that any other fact than as appearing in such statement was before the Trial Court, and the recitation in the complaint and statement of facts* of the various transactions which took place relating to the troubles of the Memphis Appeal Co., in Tennessee, *are but the history thereof and cannot be deemed or con-*

sidered as setting up any federal question upon which the plaintiff now claims to have relied for a recovery in that suit.

3d. The bill of complaint in the so-called trust deed suit instituted by the trustees thereof named therein and in which the Receiver, *pendente lite*, was appointed, *should appear on the record*, as having been a part of the facts and testimony used on the trial and appeals in this action, in that such Courts, and this Court, may have seen if such alleged federal question was therein involved, *and that the questions involving the Trustees and Defendant's rights under the agreement upon which he stands in this suit were made an issue for adjudication but it does not appear on the record.*

4th. The bills of complaint in the three so-called Creditors suits in the Tennessee Courts *should also appear by the record*, for the same purpose as assigned in the foregoing proposition, *but it does not appear on the record.*

5th. The petition for the so-called consolidation of said trust deed suit and the three creditors suits *should appear by the record*, in that this court might ascertain if such federal question was therein or thereby presented *but it does not appear on the record.*

6th. The Receiver was one appointed in a suit at the instance of parties claiming a preference over other creditors, *and was not a receiver appointed in insolvency proceedings against the Company*, nor for the purpose of winding up the Company as an insolvent; *nor did he as a fact wind up and settle the affairs of the Company*, but he *was but a receiver, pendente lite only, and had no title to any property of the Company except such title as the trustees had, and it was such title to the monies in question, in the light of defendant's*

rights thereto under the loan agreement, which was the issue set up by the pleadings and which was decided by the Court of Appeals, to be subordinate to that of the defendant thereunder.

Com. v. Beckwith, 167 N. Y. 329.

None of these papers ~~or facts~~ appear by the record, and to supply the omission and to bring his contention to the mind of this Court, the plaintiff enters upon a prolonged and exhaustive argument with the hope of converting this Court to the belief that he raised and set up a federal question in his pleadings for the trial in the Courts of New York, and that such question is somewhere hidden or involved in the historical and immaterial matter constituting the bulk of his complaint.

But plaintiff in Error contends that the federal question involved and set up is found in the ~~last~~ *decrees of the Chancery Court of Tennessee, the disregard of which is herein stated as the assigned grounds of error.*

Record, pp. 27, 29 and p. 15, Sec. 13, at close.

It is true that by the language of those decrees that Court *undertook to direct the disposition* of certain property by a public sale at auction, and to give a title thereof to a purchaser thereon, free and clear of all claims on the part of third persons, *but the record does not show that the Defendant was bound by such decrees, or that they in any way adjudicated upon his interest therein*, and it cannot be said with propriety or good judgment that a direction to do a certain act is, *in itself*, a judicial adjudication upon the general and private rights of individuals concerning such act, *unless it appears by some other judicial statement made in*

connection therewith, or otherwise that such an adjudication had then and there or prior thereto been made, and that such act was the result thereof.

As one will scan the record in vain for any evidence that the loan agreement or the defendant's rights thereunder in the property so directed to be sold were ever the subject of consideration or adjudication by the Chancery Court, how then can it be said that such decrees could divest him of such rights?

Such is not the law.

The decrees appear to have been ex parte papers, as they do not recite the appearance of counsel on their making, and it is preposterous to argue that such a paper can be set up and quoted as an adjudication of disputed rights between *people who have not been heard on the application or granting of such paper.*

If the Receiver had desired an adjudication as between himself and the defendant concerning the subject matter of the controversy between them regarding the publication of the disputed advertising matter, *the Court was open to him for such purpose, but he did not see fit to resort to such a relief, but made a law unto himself and published such matter in the face of defendant's contention* and so took all the chances of trouble of which the present suit is the sequel.

It would appear by the record that a peculiar and unusual practice exists in the Chancery Court of Tennessee, but it is somewhat surprising that the Court was made to say in said decrees, such *a misleading statement to possible purchasers on the directed sale,* as that which guar-

anteed a good and free title thereon to property, *the rights of other people thereto not having been finally adjudicated and settled—and it is a wild theory to advance, and is one which will be impossible to maintain, that the Court by a decree like those relied upon can confer a title by proclamation or otherwise, when such title is not its, or in its power to grant.*

But the disputed accounts in question in this suit were not sold under the said decrees, it was only the right title and interest of the Receiver therein that was sold.

Record, p. 15, Sec. 13.

By an examination of the thirteenth of the agreed statement of admitted facts in this suit it will be seen that it *was only the right title and interest of Receiver Chase of, in and to the claims in dispute in this suit which was sold by the Commissioners under said decrees, and from this it appears that not the accounts themselves, but only the right title and interest of the Receiver therein was sold by such Commissioners*

Record, p. 15, Sec. 13.

It is true the language of the decrees may be said to direct the Commissioners to sell all the corporate property irrespective of its possessor or character, *but the Court must look to what was done under the decrees*, and *not as* to what *the decrees may have contemplated*, and *in doing this the 13th fact in the statement as agreed* upon for *the trial dominates and determines that question.*

Record, p. 15, Sec. 13.

Did the Court of Appeals disregard such decrees, or has it in any way interferred with the sale made under them or authorized thereby?

Answering this proposition the defendant in error contends that such purchaser *obtained only a colorable title to the accounts, and that it was only the Receiver's right, title and interest of, in and to the same which constituted the actual purchase, that such accounts could only have been sold subject to the lien and rights of the Defendant therein, and that the exercise of such rights and the enforcement of such lien by the Defendant left the purchaser with but the semblance of a claim with no substance to be satisfied or realized upon by him or his assignee thereof–and that the Court of Appeals did not by its decision divest or interfere with the title or rights conferred by such sale and purchase.*

AS IT WAS ONLY THE RIGHT TITLE AND INTEREST OF THE RECEIVER IN THE DISPUTED ACCOUNTS WHICH WAS SOLD TO CRAWFORD IT MUST BE CONCEEDED THAT WAS ALL HE PURCHASED AND AS SUCH INTEREST WAS SECONDARY TO THE DEFENDANT UNDER THE LOAN AGREEMENT THERE WAS NO SUBSTANCE LEFT FOR THE PURCHASER.

The record does not set forth any list or Schedule of property or accounts sold under the decrees hence it cannot be said that the accounts irrespective of the Receiver's right, title and interest therein was sold thereunder, and it must be conceeded that the said 13th fact of said agreed statement is the only thing on the record which covers that question, and that it was only such interest as the Receiver had in the disputed accounts which was sold to plaintiff's assignor, and it does not appear on the face of the record that any court in Tennessee had ever considered or determined in any way the right title and interest of the receiver in the disputed accounts or that such a question was ever before them for

its consideration or that defendant's rights under that agreement were ever considered by such courts—

This position being established it is clear that the Court of Appeals was not in error in directing the Supreme Court as complained of, for there is nothing on the record showing that the accounts were sold in any other way except the right, title and interest of the Receiver therein, and it became the duty of that Court of Appeals upon its consideration of the appeal, to ascertain what such right, title and interest of the Receiver in such accounts was, as the record does not show that the Tenn. Courts had done so, and to decide if or not the defendant by his action had deprived the purchaser thereof, and this is all that such Court did in its reversal of the judgment of the Court below, *for the Court of Appeals decision on this subject goes only to the extent of holding that under the loan agreement the defendant had a right to collect all bills for advertising arising under that agreement, and appropriate and apply the same in liquidation of said $30,000 loan the sum of $1,000 per month, and that it was the excess thereon in such accounts which belonged to the Receiver and that the defendant had a lien by virtue of such agreement upon the collection proceeds to satisfy at least $1,000 per month for such purpose, and that his action set forth in the complaint was justifiable for such reason,* or in other words, *that the right, title and interest of the Receiver in the accounts sold to Crawford was only the excess (if any) of such collections by the defendant which might exist after the application by him of $1,000 per month therefor to reduce the loan account, and as the sums collected by defendant did not exceed that amount in that the entire sum collected was not sufficient to make up*

the $1,000 per month for the time covered in their collection, but absorb the entire amount collected, there was no excess to which the right, title and interest of the receiver could attach, and that he had but a colorable interest in such accounts to be sold, and consequently Crawford as the purchaser acquired no greater or other interest on the sale than the receiver himself had in such accounts, which must be concluded as amounting to nothing, and that such sale was subject to the rights of defendant under that agreement.

Com. v. Beckwith, 167 N. Y., 329 (Opinion).

Hence it is, that *the Court of Appeals has not in any way interfered with or disregarded either of the decrees of the Tennessee Court or U. S. Court touching this matter, but decided the appeal on a ground entirely independent from one involving a federal question and strictly within the 13th admitted fact in this cause*, and in doing so it has but decided what the right, title and interest of the receiver was in said accounts, which had not been done by the Courts in Tennessee, *and has not sought to or in any way passed upon or disregarded the validity or legality of the said decrees under which such interest was sold, nor made any decision in disregard thereof or as to the validity of the sale, and for all that the record shows, the Court of Appeals must be regarded as acquiescing in such decrees in all respects, so far as it was in its power or province to do.*

To conclude the consideration of the question presented by this point it may be said with confidence that no federal question appears by the record, *but if there be a colorable one appearing thereby*, that the case comes *within the practice long since established in this Court, "that if a decision*

"of a federal question, fairly presented by the "record, is rendered unnecessary by the view "which the Court properly takes of the rest of the "case within the scope of the pleadings, the judg- "ment is not open to review in the Supreme "Court."

If there be a federal question of some kind fairly presented by the record in this cause, and a *decision thereon by the Court is unnecessary by the view it takes of the rest of the case within the scope of the pleadings, the judgment cannot be review'd, the writ should be dismissed and the judgment affirmed for the frivolousness of the grounds upon which it was taken, and for delay.*

Spies v. Ilinois, 123 U. S., 13'.
Chapman v. Goodnow, 123 U. S., 540.
Brooks v. Missouri, 124 U. S., 394.
Philipps v. Association, 124 U. S., 605.
French v. Hopkins, 124 U. S., 524.
Cited and followed in, 181 U. S., 49.

THE PRACTICE OF THIS COURT IN CASES OF THE KIND AT BAR HAS BEEN FULLY AND EXAAUSTIVELY SET FORTH IN A RECENT DECISION, FROM WHICH WE BEG THE PRIVILEGE TO QUOTE.

"With respect to writs of error from this Court "to judgments of State Courts in actions between "purchasers under judicial proceedings in the "Federal Courts and parties making adverse "claims to the property sold, the true rule is this: "That the writ will lie, if the validity or con- "struction of the judgment of the Federal Courts "(or State Court) or the regularity of proceedings "under it are assailed; but if it be admitted that "the judgment (decrees) was valid and such pro- "ceedings (the sale) were regular and that the pur- "chaser took the title of the defendant (The Mem- "phis Appeal Co. insolvent, as represented by the "Receiver) and the issue relates to the title

"to the property sold, as between such defendant "or the purchaser, and the third party making "the adverse claim (defendant in error) no Federal "question is presented."

Avery v. Popper, 179 U. S., 305, decided Dec. 3, 1900.

In the case at bar the record does not show that the validity or the construction of the decrees of the Chancery Court, or as entered in the Circuit Court of the U. S. for Tennessee, nor the regularity of the sales proceedings thereunder are assailed, *but on the contrary, it clearly appears by the record that such decrees and sale are unassailed and admitted* (Record, pp. 14 & 15, Secs. 12 & 13), and that the only question at issue in the suit was as to the *merits of the adverse claim set up by the defendant in error, to the property alleged to have been sold under the decrees*, and which were supported by the N. Y. Court of Appeals in and by its action complained of under this writ.

As the case at bar, and the one last cited seem to be analogous and similar in all material respects, it is submitted that the writ herein should be dismissed under the rule laid down in that decision.

Conclusion.

It is therefore submitted that the record before this Court does not show with due certainty that the Courts in Tennessee ever adjudicated the rights of defendant under the loan agreement, or any dispute between him and the Receiver concerning the accounts in question in this suit, or that the Court of Appeals decided adversely to a standing controlling decision, decree or judgment of the Court of another State establishing the

questions presented by said record and brought up by this writ, and that there is no sufficient federal question presented by said record for the consideration of this Court, and that the writ of error should therefore be here dismissed for want of jurisdiction, in this Court to review the judgment complained of, and that such judgment be affirmed by this Court because of the frivolousness of the grounds for said writ, and for that said writ was for the purpose of delay; and that the defendant in error have his costs and disbursements of these motions, and interest at six per centum upon his judgment, together with ten per centum additional thereto on said judgment as damages for his delay upon proceedings on said judgment by reason of said writ, and that the mandate of this to the lower Court be made accordingly.

All of which is respectfully submitted.

Dated New York, Sep. 25, 1901.

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